United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1231

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

UNITED STATES OF AMERICA, ex rel.
GEORGE FOYE,

Plaintiff-Appellant,

-against-

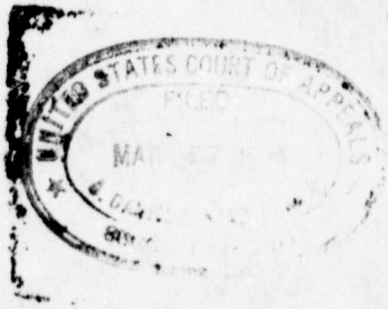
J.E. LaVALLE, Superintendent of
Clinton Correctional Facility, Dannemora,
N.Y.,

Defendant-Appellee.

DOCKET NO.
74-1231

BRIEF FOR APPELLANT

ON APPEAL FROM A MEMORANDUM - DECISION
AND ORDER
OF THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF NEW YORK



MICHAEL DAVIDOFF, ESQ.
Attorney for the Appellant
Ten Hamilton Ave.
P.O. Box 809
Monticello, New York 12701

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ISSUE PRESENTED

Was the refusal of the Trial Judge to allow the Appellant's Counsel the right to examine the notes and the written report of the State Police Investigator after he testified when it was produced in Court and available, a deprivation of Appellant's rights as provided in the 6th Amendment of the Constitution as to confrontation and cross-examination of witnesses, and therefore a violation of his Constitutional Rights as to due process of law as guaranteed by the 14th Amendment of the Constitution of the U.S.

STATEMENT PURSUANT TO RULE 28 (3)

Preliminary Statement

This is an appeal from a Memorandum-Decision and Order of the United States District Court for the Northern District of New York (The Honorable James T. Foley) dated January 4th, 1974, denying and dismissing Appellant's application for a Writ of Habeas Corpus. On January 22nd, 1974, Judge Foley Granted your Appellant's application for a Certificate of Probable Cause, and on February 11th, 1974, granted the Appellant leave to proceed in forma pauperis.

Appellant's Petition for a Writ of Habeas C orpus contained issues other than that issue which is the object of this appeal. Appellant seeks appeal to this Court only on the one issue, as presented before this Court. I n regard to the issue in Appellant's Petition that the prosecution had an obl igation to apprise the Court and Jury of the nature of the promise of leniency which was given to DELOIS HARDEN in return for her testimony, a ppellant will follow the suggestion of the Memorandum-Decision and Order of Judge Foley in his dismissal of that issue, on the grounds of failure to exhaust State Court remedies. Appellant will, at a future time, therefore, make necessary application to the appropriate State Court in regard to that issue. United States ex rel. Levy v. McMann, 394 F.2d 402, 404 (2 Cir. 1968).

STATEMENT OF FACTS

A. Prior Proceedings

After a Jury Trial in the County Court of Sullivan County, State of New York, the Appellant was convicted of the Class A Felony of Murder, and on the 13th day of July, 1973, judgment and sentence was pronounced by the County Court of the County of Sullivan, sentencing him to an indeterminate term of imprisonment, the minimum of which shall be fifteen years and the maximum shall be the term of the Petitioner's natural life. Appellant's conviction was affirmed, without opinion, in the Supreme Court of the State of New York by the Appellate Division, Third Department. (41 AD 2d 902 (1973)), and leave to appeal to the Court of Appeals was denied by the Honorable Charles D. Breitel, Associate Judge, on the 12th day of June, 1973.

Petitioner made application by nature of a Petition for a Writ of Habeas Corpus to the United States District Court for the Northern District of New York, by Petition verified the 20th day of November, 1973. It is from the denial of this Petition and the dismissal by the Memorandum-Decision and Order of the Honorable James T. Foley, United States District Court Judge, that the Appellant appeals to the United States Court of Appeals for the Second Circuit. (AP80, 81, 82, 83, 84)

B. Facts

The Appellant, and one DELOIS HARDEN, were jointly indicted for Murder by indictment of the Sullivan County Grand Jury, dated the 21st day of February, 1972. A severance was granted by the Sullivan County Court. The Appellant's case commenced by the selection of a Jury on the 16th day of May, 1972. During the Appellant's trial before the Sullivan County Jury, the People of the State of New York in their direct case, called as a witness, INVESTIGATOR BROWN, a member of the New York State Police, and the officer in charge of the investigation concerning the circumstances surrounding the death of the infant, for whom the Appellant was charged with the crime of Murder. On direct examination, the officer testified as to his conversations with the Appellant, and with DELOIS HARDEN. (DELOIS HARDEN became the prosecutions principal witness against the Appellant after she pled guilty to a reduced charge of Assault in the 1st Degree, prior to the trial of the Appellant) INVESTIGATOR BROWN also testified as to his conversations with the other parties. On cross-examination, INVESTIGATOR BROWN admitted that he had made notes and from his notes, had prepared a written report, which report contained the results of his investigation and that he had filed this written report with his superiors, and ONE MONTH PRIOR TO HIS TESTIFYING AT THE TRIAL, HAD REFRESHED HIS RECOLLECTION FROM THIS WRITTEN REPORT. (AP 4, 32 & 33)

The Appellant's attorney made the appropriate motions to the Trial Court Judge for the production of that report, and for it to be made available in its entirety for examination by Appellant's Counsel. The Trial

Court Judge not only refused Appellant's Counsel the right to inspect the notes and written report of INVESTIGATOR BROWN, but allowed the notes and written report to be brought into the Court and to be reviewed, NOT BY THE TRIAL COURT JUDGE, NOT BY THE APPELLANT'S COUNSEL, BUT BY THE ASSISTANT DISTRICT ATTORNEY, prosecuting the case on behalf of the State of New York, who was then instructed to turn over to the Appellant's Counsel, only those portions of the notes and written report which he, the Assistant District Attorney, believed were material. Out of the entire report, Appellant's Counsel was entitled to see only a couple of sentence excerpts. (AP 6, 51, 52, &53)

ARGUMENT

A. Summary

The refusal of the Trial Court Judge to allow Appellant's Counsel the right to inspect and to use for the purposes of cross-examination of INVESTIGATOR BROWN, the notes and written report of his investigation (after he had been called as a witness on behalf of the PEOPLE and had given testimony on their behalf and had admitted that he had prepared a written report and had submitted a written report to his superiors and had referred to that written report within one month of testifying and had refreshed his recollection at the trial and after the written report had been produced at the time of trial) was a violation of Appellant's Constitutional Rights as guaranteed by the 6th Amendment as to the confrontation and cross-examination of witnesses, and therefore, a denial of due process of law as guaranteed by the 14th Amendment of the Constitution of the United States.

B. Argument-Federal Rule

The Federal Rule is well established in (that statements or reports of a government witness who has testified on direct examination may be produced for inspection by the defense in a federal criminal case where such papers fall within the statutory definition of producible "statement" and relate to the subject matter as to which the witness has testified.) ((7 ALR 3d, 273.)

The United States Supreme Court in Jencks v United States 353 US 657, 1 L. Ed 2d 1103, 77 S Ct. 1007, stated at page 688 as follows:

> "This Court held in Goldman v. United States, 316 U.S. 129, 132, that the trial judge had discretion to deny inspection when the witness"... does not use his notes or memoranda (relating to his testimony) in court..." We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F.B.I., touching the events and activities as to which they testified at the trial. We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice required no less."

In response to the Jenck's Case, Congress passed the Jencks Act (18 USC § 3500), which controls the production of a government witnesses statement and report.

If the facts of this case had occurred in Federal prosecution, there would have been reversable error for the Trial Court Judge to have refused Appellant's Counsel's request.

In the United States v. McCarthy, 301 F2d 796 (3d Cir., 1962), the Court of Appeals held that the report which was prepared by an F.B.I. agent from notes taken by two agents in interview of defendant five days after bank robbery and which was checked for accuracy by other agent, who was witness, was written statement signed or otherwise adopted or approved by witness within Jencks Act and failure to permit defense counsel to view report, which had been routinely destroyed before trial, was prejudicial where it affirmatively appeared that report could have been advantageously used by defense.

The Court went further in that case and discussed whether or not the failure of the lower court to permit defense counsel to review the report was harmless error. On page 801, the Court stated as follows:

> "We do not pretend to have exhausted the useful potentialities of the report to the defense and as the Supreme Court said in Clancy et al. v. United States, 365 U.S. 312, 81 S. Ct. 645, 5 L.Ed. 2d 574 (1961)"*** it is not for us to speculate whether they could have been utilized effectively." In that opinion as already quoted the Court reiterated its dispositive statement in Jencks v. United States, 353, U.S. 657, 667, 77 S. Ct. 1007, 1013, 1 L.Ed. 2d 1103 (1961), relative to the type of report before us, saying:
>
> > "Flat contradiction between the witness' testimony and the version of the events given in his report is not the only test of inconsistency. The omission from the reports of

> facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony."

In the case of United States v. Meisch 370 F. 2d 768 (3 d Cir. 1966) the United States Court of Appeals held that where it appeared that the report by a special agent who allegedly had observed sale of notes by defendant could have been advantageously used by defense to impeach special agent concerning his testimony, refusal of court to direct prosecution to deliver report to defendant for his use at trial was prejudicial error. The court went further in this case in discussing when such report should be permitted to be used by the defendant and stated at page 772 as follows:

> "Whether the statements may be useful for purposes of impeachment i s a decision which rests, of course, with the defendant himself." Scales v. United States, 367 U. S. 203, 258, 81 S. Ct. 1469, 1501, 6 L. Ed. 2d 782 1961). In Campbell v. United States, 373, U. S. 487, 497, footnote 13, 83 S. Ct. 1356, 10 L. Ed. 2d 501, the Supreme Court pointed that under Jencks v. United States, 353 U. S. 657, 677-678, 77 S. Ct. 1007, 1501, 1 L. Ed. 2d 1103, a showing of inconsistency as a prerequisite to the production of documents is unnecessary. See also Lewis v. United States, 340 F. 2d 678 (C. A. 8); United States v. Prince, 264 F. 2d 850, 852 (C. A. 3).

Nevertheless, as has been indicated earlier, it affirmatively appears that the report could have been advantageously used by the defense to impeach Szpak concerning his testimony of events about the informant, Barker, who accompanied Vecchione to the parking area of the Cork and Bottle Bar in Edison Township. The refusal of the trial judge to direct the prosecution to deliver the May 26, 1964, report, with such portions which did not relate to the subject matter of Szpak's testimony deleted, to the appellant for his use at the trial, was not harmless error. See United States v. McCarthy, 301 F.2d 796 (C.A. 3, 1962)."

C. New York Law

The law of the State of New York in regard to the cross-examination of a police or investigating officer testifying for the prosecution is contained in the New York Court of Appeals Decision of People v. Rosario, 9 N.Y. 2d 286, 173 N.E. 2d 881, 213 N.Y.S. 2d 448, citing as its authority Jencks v. The United States 353 U.S. 657, stated at page 289 as follows:

> "That a right sense of justice entitles the defense to examine a witness' prior statement, whether or not it varies from his testimony on the stand. As long as the statement relates to the subject matter of the witness' testimony and contains nothing that must be kept confidential, defense counsel should be allowed to determine for themselves the use to be made of it on cross-examination."

The Court of Appeals of the State of New York in People v. Malinsky 15 N.Y. 2d 86, reaffirmed its position as stated in People v. Rosario, supra) by saying at page 90:

> "As to the later contention, the Court is of the opinion that Detective Sullivan's notes should have been turned over to the defendants for their inspection and possible use. We made it unmistakably clear in People v. Rosario (9 NY2d 286) that defense counsel must be permitted to examine a witness' prior statement, whether or not it differs from his testimony on the stand, and to decide for themselves the use to be made of it on cross-examination, provided only that the

> statement "relates to the subject matter of the witness' testimony and contains nothing that must be kept confidential" (p. 289). And, obviously, it matters not whether the witness is testifying upon a trial or at a hearing. In either event, "a right sense of justice" entitles the defense to ascertain what the witness said about the subject under consideration on an earlier occasion."

In the case before this Court, there never was any claim by the prosecution that anything contained in the State Police Report of INVESTIGATOR BROWN must be kept confidential.

Though the report was brought into Court, it was not looked at by the Trial Court Judge and the Assistant District Attorney who was prosecuting the case was instructed to look through the report and to excerpt only that portion of the report which, he, the prosecuting attorney, believed was material to the testimony of the investigating officer. (AP 52 & 53)

D. Argument-Decision of Judge Foley

Judge Foley in his Memorandum-Decisi on and Order, stated "that the ruling of the Trial Court was in accordance with New York Law, and the defense had express procedural provisions in that Law to move for discovery before trial or to subpoena the report before the cross-examination stage." (AP 82)

The question presented to this Court is not what steps could have been taken in regard to pre-trial disclosures, but as to what rights the Appellant had to the cross-examination of a witness produced by the People and put on the stand to testify by the People.

The issue is one as to the rights of cross-examination and confrontation of witnesses as protected by the 6th Amendment of the Constitutution of the United States.

The Federal Law is well settled and so is the Law of the State of New York which follows the Federal Rule.

Judge Foley, went on to say in his Memorandum-Decision and Order "There is no showing, and I recognize that an examination only would fully inform, that non-disclosure was prejudical to such extent so as to deprive the petitioner of a fair trial."(AP 82)

The Federal cases cited above recognize that it is not necessary for the defendant to show that there are inconsistencies in the report before it is to be provided to the defendant. It is sufficient that the State Police Officer testified that the report contained all of his notes in

regard to his questioning of the co-defendant, DELOIS HARDEN, and also in the questioning of the other witnesses who may have been those who were produced at the trial and who testified on behalf of the People. It is for the defendant to decide what useful purpose, if any, should be made of the report. United States v. Meisch 370 F. 2d 768 (3d Cir. 1966).

It is impossible for the Appellant to set forth exactly what prejudice he sustained by failure to see the report, since neither the defendant, nor his counsel has ever seen a full copy of the report. That is the very reason that the Federal Rule and the New York Rule give the defendant the opportunity to see the report, so that the defendant himself can make the determination as to what use, if any, to make of it.

E. Argument-Federal Habeas Corpus Relief is appropriate

The refusal by the Trial Court Judge to allow the Appellant's Counsel to examine and use for the purposes of cross-examination, the written report of the testifying State Police Officer, was a deprivation of Appellant's 6th Amendment to the Constitution, the right to effective cross-examination and confrontation of the witnesses, and therefore, a denial of the due process clause of the 14th Amendment of the Constitution of the United States. The United States Supreme Court in Brady v. Maryland, 373 U.S. 83 at p. 87, 83 S.Ct. 1194, 1196-1197, 10 L.Ed. 2d 215 (1963) stated as follows:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." This requires a reversal of the order of the district court."

In United States of America ex rel. Butler v. Maroney, 319 F2d. 622 (3d Cir. 1963) the Circuit Court of Appeals stated that the Habeas Corpus applicant was denied due process in State Court Trial of murder charge, by refusal to permit him to examine his statement to police. The Court there stated at page 627 as follows:

> "This withholding by the Commonwealth of information impinging on a vital area in appellant's defense is a denial of the Due Process Clause of the 14th Amendment of the Constitution."

CONCLUSION

The Appellant's 14th Amendment right to due process of law, was violated by the refusal of the Trial Court Judge to allow Appellant's Counsel to inspect, for the purposes of cross-examination, the State Police notes and written report of the testifying officer, which thereby denied Appellant's 6th Amendment right to effective confrontation and cross-examination of the witness. The HON. JAMES T. FOLEY, Memorandum-Decision and Order improperly denied and dismissed Appellants' Petition for a Writ of Habeas Corpus. This Court is respectfully requested to reverse the Memorandum-Decision and Order of the HON. JAMES T. FOLEY, District Court Judge, and grant Petitioner's application for a Writ of Habeas Corpus.

Respectfully submitted,

MICHAEL DAVIDOFF, ESQ.
Attorney for the Plaintiff-Appellant
Ten Hamilton Avenue
P.O. Box 809
Monticello
New York 12701
Telephone No. --(914) 794-5110

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, ex rel.
GEORGE FOYE,

Plaintiff-Appellant,

-against-

J.E. LaVALLE, Superintendent of
Clinton Correctional Facility,
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Defendant-Appellee

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AFFIDAVIT OF MAILING

DOCKET NO. 74-1231

STATE OF NEW YORK)
) SS:
COUNTY OF SULLIVAN)

LINDA M. HOOSAC, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at Woodbourne, New York.

That on the 26th day of March, 1974 deponent served the Appendix and the Brief (2 copies) upon GENE MECHANIC, ESQ., the attorney for the Defendant-Appellant in this action at Attorney General's Office, Dept. of Law-Litigation Bureau, 2 World Trade Center, New York, New York 10047, the address designated by said attorney for that purpose by depositing same enclosed in a postpaid properly addressed wrapper, in a official depository under the exclusive care and custody of the United States post office department within the State of New York.

Linda M. Hoosac

LINDA M. HOOSAC

Sworn to before me this 26th
day of March, 1974.

Yvonne Winfield

Notary Public

YVONNE WINFIELD
Notary Public, State of New York
Sullivan County Clerk's #1181
Commission Expires March 30, 1976

COOKE, McBRIDE,
DAVIS & GREENBERG
OFFICES OF LAW
MONTICELLO, NEW YORK 12701